No. 82410-0

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON



QUINAULT INDIAN NATION, et al.,

Petitioners,

v.

SEA CREST LAND DEVELOPMENT CO., et al.,

Respondents.

# BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT SEA CREST LAND DEVELOPMENT CO.



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## INTRODUCTION

As a general rule, the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. *Montana v. United States*, 450 U.S. 544, 565 (1981). There are two exceptions to this rule. The exception at issue in this case (the second *Montana* exception) relates to a tribe's inherent authority concerning activity that threatens the tribe's political integrity, economic security, or health and welfare. The U.S. Supreme Court has repeatedly cautioned that the second *Montana* exception must be narrowly construed such that the exception does not swallow up the general rule. Accordingly, courts construing the second *Montana* exception have limited its application to those exceptional circumstances where the tribe demonstrates that a nonmember's actions imperil tribal sovereignty—simply showing that a nonmember's actions may impact a tribal interest is not a sufficient basis for the exercise of inherent authority.

Here, non-tribal member Sea Crest Land Development Co. developed a residential cabin on its parcel of non-Indian fee land located on the northwestern tip of the Quinault Indian Reservation. The Quinault Indian Nation (QIN) secured a default order in Tribal Court, blocking Sea Crest's development, and ordering specific performance, damages, and sanctions.

CP 507-09. But, on a petition to enforce the tribal court order, the Jefferson County Superior Court concluded that *Montana's* second exception did not apply and the tribal court lacked subject matter jurisdiction over Sea Crest's property: "It does not appear that the development by Sea Crest threatens the ability of the Quinault Indian Nation to exercise its sovereign power of self-government nor that this particular development threatens the Nation's control over its internal relations." CP 551.

QIN seeks reversal of the Superior Court's decision, but has failed to show any set of facts that would support an application of the second *Montana* exception. And without such evidence, QIN cannot overcome its burden of proof and the strong presumption that its exercise of jurisdiction over Sea Crest's property was invalid. Amicus respectfully requests that this Court affirm the Superior Court's order denying QIN's petition for recognition of a tribal court judgment against Sea Crest.

## ISSUE ADDRESSED BY AMICUS

Whether the Quinault Indian Nation has regulatory and adjudicatory jurisdiction over Sea Crest's property by virtue of an exception to the rule that tribes lack jurisdiction over non-Indian fee land as outlined in *Montana v. United States*, 450 U.S. at 565.

## ARGUMENT

## I

## THE U.S. CONGRESS DIVESTED THE QIN OF JURISDICTION OVER NON-INDIAN FEE LAND WITHIN THE RESERVATION

In 1887, the U.S. Congress enacted the General Allotment Act, and land within the Quinault Indian Reservation was allotted to individual tribe members. *Indian General Allotment Act of 1887*, 25 U.S.C. § 331, *et seq.*; *see also Quinault Allotment Act*, 36 Stat. 1345 (1911); *Quinault Indian Nation v. Grays Harbor County*, 310 F.3d 645, 647-48 (9th Cir. 2002). The allotted lands remained in trust for 25 years, then a fee simple patent was issued to the allottee free from any encumbrance or restriction on alienability. 25 U.S.C. § 348. After issuance of a fee simple patent, the allottee became subject to the civil and criminal laws of the state in which he or she resided.[1] 25 U.S.C. § 349 ("[E]ach and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.").

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[1] The property at issue in this appeal was allotted and sold by patent as non-Indian fee land in 1928. CP 573, 577-78.

Eventually, the practical results of the Allotment Act were seen as being largely negative for the tribes, and Congress concluded that its policy had been misguided and it ended further allotments in 1934. *Indian Reorganization Act*, 25 U.S.C. § 461, *et seq.*; *Quinault Indian Nation*, 310 F.3d at 647-48. Nonetheless, by the mid 1980s, 30 percent of the Quinault reservation had been transferred in fee to nonmember ownership. *Quinault Indian Nation*, 310 F.3d at 648.

The Allotment Act had a dramatic impact not only on tribal land ownership patterns, but also on tribal verses state jurisdiction. One of these consequences, was a "checkerboard" pattern of tribal and non-Indian fee land within a reservation's boundaries. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 499 (1979). Congress' repudiation of the Allotment Act did not change the existing rights on these allotted lands, and "valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected." 25 U.S.C. § 463(a). Indeed, Congress anticipated that allotted lands might eventually be owned by non-Indians and intended the cessation of tribal jurisdiction over those lands:

> throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs

> and jurisdiction. [I]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

*Montana*, 450 U.S. at 559 n.9 (citations omitted). While Congress later repudiated its allotment policy, it did not alter "the effect of the land alienation occasioned by that policy." *Id.*

In specific regard to activities of nonmembers on allotted fee lands, the U.S. Supreme Court adopted a "general proposition" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565, and spelled out the limited nature of remaining tribal jurisdiction over non-Indian land:

> Although Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, *United States v. Wheeler*, 435 U.S. 313, 326 (1978), the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation," *Montana*, 450 U.S. at 564.

*South Dakota v. Bourland*, 508 U.S. 679, 694-95 (1993).

The singular issue on review is whether the Jefferson County Superior Court correctly determined that the second *Montana* exception did not apply

and that QIN lacked personal jurisdiction over Sea Crest and subject matter jurisdiction over the development of Sea Crest's non-Indian fee patent land.

## II

## THE STANDARD OF REVIEW WEIGHS STRONGLY AGAINST TRIBAL JURISDICTION OVER A NONMEMBER'S USE OF NON-INDIAN FEE LAND

In its reply brief, QIN suggests that a federal policy of strengthening tribal self-government should result in a more lenient standard of review on appeal. *See* QIN Reply Br. at 12-15. But QIN's argument fails to acknowledge that the U.S. Supreme Court established a rigorous standard of review applicable to a jurisdictional determination under *Montana* which places the burden of proof of the tribe to overcome a strong presumption that its exercise of jurisdiction was invalid.

### A. There Is a Strong Presumption Against Tribal Jurisdiction over Non-Indian Fee Land and QIN Bears the Burden of Proving That One of the *Montana* Exceptions Applies

The Superior Court's decision was issued under the authority of Civil Rule 82.5(c) ("Enforcement of Indian Tribal Court Orders, Judgments or Decrees"), which reads:

> The superior courts of the State of Washington shall recognize, implement and enforce the orders, judgments and

> decrees of Indian tribal courts in matters in which either the exclusive or concurrent jurisdiction has been granted or reserved to an Indian tribal court of a federally recognized tribe under the Laws of the United States, *unless the superior court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a party or the subject matter*[.] (Emphasis added.)

The Court reviews the trial court's jurisdictional determination de novo.[2] *Smale v. Noretep*, 150 Wn. App. 476, 478 (2009). On review, the tribe bears the burden of proving that jurisdiction exists. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, – U.S. –, 128 S. Ct. 2709, 2720 (2008); *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990).

In addition, there is a strong presumption against the exercise of tribal jurisdiction over a nonmember's use of non-Indian fee land. Indeed, the ownership status of land is "a factor significant enough that it 'may sometimes be . . . dispositive' " in determining whether regulation of the activities is necessary to protect tribal self-government or to control internal relations. *Nevada v. Hicks*, 533 U.S. 353, 370 (2001) (citation omitted). Accordingly, efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid. *Plains Commerce*, 128 S. Ct. at

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[2] The tribal court entered no findings of fact or conclusions of law supporting its exercise of jurisdiction over Sea Crest and its non-Indian fee land. CP 508.

2720; *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978) ("considerable weight" should be given to the presumption against tribal jurisdiction over nonmembers). This presumption "is particularly strong" when the nonmember's activity occurs on non-Indian fee land because "once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." *Plains Commerce*, 128 S. Ct. at 2719 ("This necessarily entails 'the loss of regulatory jurisdiction over the use of the land by others.) (citation omitted).

### B. *Montana* Is Narrowly Construed and Requires Careful Scrutiny

Although the second *Montana* exception is "broadly framed, this exception is narrowly construed." *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998); *see also Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1223 (9th Cir. 2001) (The second exception is "exceedingly narrow."). The U.S. Supreme Court has repeatedly cautioned that the second *Montana* exception is limited, and cannot be construed in a manner that would either swallow the rule or severely shrink it. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 n.12 (2001) (quotations and citation omitted); *see also Plains Commerce*, 128 S. Ct. at 2720. This exception encompasses "nothing beyond what is necessary to protect tribal self-government or control internal

relations." *Atkinson Trading Co.*, 532 U.S. at 646; *Strate v. A-1 Contractors*, 520 U.S. 438, 458-59 (1997).

Accordingly, the U.S. Supreme Court rejected as overbroad the proposition that tribes *per se* retained sovereign authority to regulate all lands within a reservation.[3] *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408, 428 (1989). The second *Montana* exception "does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe." *Id.* at 431; *see also Phillip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 937, 943 (9th Cir. 2009) (A showing of generalized threats to tribe members or tribal property "is not what the second *Montana* exception is intended to capture."). Instead, the standard enunciated by *Montana* requires close, careful scrutiny of the justification for the exercise of tribal authority in each case, which turns on the extent to which nonmember conduct "threatens" or "imperils"

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[3] The U.S. Supreme Court has elsewhere recognized that generalizations about tribal self-government are "treacherous" and, accordingly, there is no formula to determine whether an application of state or local laws would infringe upon a tribe's political integrity. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

the political integrity, the economic security, or the health and welfare of the tribe. *Montana*, 450 U.S. at 566.

### C. QIN Failed To Overcome the Presumption of Invalidity

The tribe makes two general claims in support of its exercise of jurisdiction under the second *Montana* exception. First, the tribe claims that a nonmember's refusal to comply with tribal regulations is such an affront to the tribe that it imperils its political integrity. Second, QIN claims that potential impacts to the areas natural resources could threaten the tribe's economic security, health, and welfare. These arguments fail to satisfy *Montana*.

#### 1. A Nonmember Owner of Non-Indian Fee Land Is Not Required To Submit to Tribal Regulations Without a Jurisdictional Determination

QIN's primary argument in support of inherent jurisdiction is that Sea Crest's refusal to submit to tribal land use regulations constituted a threat to the tribe's political integrity. QIN Opening Brief at 19-20; QIN Reply Brief at 6-7; *see also* CP 4 (Arguing that a nonmember's refusal to comply with tribal regulations causes a "domino effect" encouraging other nonmember developers to do the same.). This argument, however, does not implicate the tribe's political integrity, because "*[s]elf*-government and *internal* relations

are not directly at issue here, since the issue is whether the Tribes' law will apply, not to their own members, but to a narrow category of outsiders." *Hicks*, 533 U.S. at 371; *Strate*, 520 U.S. at 459 (A tribe's inherent power does not reach "beyond what is necessary to protect tribal self-government or to control internal relations."). Moreover, this precise argument was rejected in *Brendale*, where the U.S. Supreme Court held that a general claim of regulatory authority was overbroad, and required the tribe to demonstrate the actual impacts of a nonmembers' actions to support its jurisdictional claim. *Brendale*, 492 U.S. at 428, 431.

Underlying QIN's argument is the incorrect assumption that the tribe had *exclusive* regulatory jurisdiction over Sea Crest's property. But by virtue of its allotment and sale in fee simple to a nonmember, Sea Crest's property was indisputably subject to the regulatory jurisdiction of Jefferson County. *Brendale*, 492 U.S. at 431. And the County properly exercised its authority when it reviewed and issued permits on Sea Crest's land use applications. *Id.* While QIN criticizes Jefferson County for not adequately protecting the tribe's interest, the County's alleged "laz[iness] or indifferen[ce]" (QIN

Reply Br. at 7) does not support an application of the second *Montana* exception against Sea Crest.[4] *Brendale*, 492 U.S. at 431.

According to *Brendale*, QIN should have availed itself of the county zoning proceedings to demonstrate whether Sea Crest's development proposal would *in fact* impact tribal interests. *Id.* If the County's land use decision failed to respect the tribe's protected interests, then QIN would have a cause of action in federal district court, where "a judgment could be made as to whether the uses that were actually authorized on [the] property imperiled the political integrity, the economic security, or the health or welfare of the Tribe." *Id.* But QIN did not avail itself of the opportunity to demonstrate that Sea Crest's activities threatened tribal sovereignty by participating in Jefferson County's permit review proceedings, and cannot now argue that the proceedings failed to adequately protect its interests.

**2. A Claim of Theoretical Harm to Natural Resources Cannot Support Inherent Jurisdiction Under *Montana***

QIN alternatively argues that Sea Crest's development activities could *potentially* impact the area's natural resources (such as timber, wild game,

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[4] Instead, as the trial court noted: "This possibly could have been an action by the Tribe against Jefferson County challenging the issuance of the building permit pursuant to the Land Use Petition Act." CP 551.

fish, and shellfish beds) and could have a "domino effect" of encouraging other development in the area, thereby threatening the economic security and the health and welfare of the tribe. QIN Opening Brief at 19-20; QIN Reply Brief at 6-7; CP 4. The problem with this argument is that it is wholly speculative. *Kennedy v. Sea-Land Serv., Inc.*, 62 Wn. App. 839, 857 (1991) (Speculation does not raise a question of fact.). QIN did not support its petition below by providing any evidence that Sea Crest's development actually impacted tribal property or other interests—let alone that Sea Crest's development activities caused other owners of non-Indian land to develop their properties.

Instead, the tribe tries to circumvent its burden of proof by explaining that its land use regulations are designed to protect the environment and natural resources, and *if* Sea Crest had submitted to tribal regulatory authority, it would have been required to fully assess the environmental impacts of the development. QIN Opening Brief at 20-21. The tribe's claim of potential harm cannot justify jurisdiction under the second *Montana* exception, which requires a showing that the actions of a nonmember directly affects or threatens tribal sovereignty. The trial court correctly concluded that "[g]iven the facts of this case" it could not "find that Sea Crest's activities in

some way threaten tribal self government or the Quinault Nation's control over its internal relations." CP 551.

## III

## ABSENT EXTRAORDINARY CIRCUMSTANCES, NONMEMBERS SHOULD NOT BE SUBJECTED TO THE PROCEDURAL AND SUBSTANTIVE UNCERTAINTIES OF TRIBAL COURTS

There is a strong public policy disfavoring the exercise of tribal jurisdiction over nonmembers due to the uncertainty inherent in tribal courts. *See, e.g.*, *Hicks*, 533 U.S. at 383-84; *Duro v. Reina*, 495 U.S. 676, 693 (1990); *Oliphant*, 435 U.S. at 210-11. Most recently, Justice Souter, writing in concurrence in *Hicks*, wrote that the "ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals.'" *Hicks*, 533 U.S. at 383 (Souter, J., concurring) (joined by Justices Thomas and Kennedy) (quoting *Duro*, 495 U.S. at 693). Justice White echoed this concern in his lead opinion in *Brendale*, where he wrote that unless *Montana*'s second exception is narrowly construed, jurisdiction over non-Indian fee land could conceivably shift back and forth between a tribe and county depending on how a tribe's interests are affected by any particular use

of fee land. *Brendale*, 492 U.S. at 431. "Uncertainty of this kind would not further the interests of either the Tribe or the county government and would be chaotic for landowners." *Id.* at 430.

This policy concern is directly implicated here, where QIN has asserted jurisdiction over every phase of Sea Crest's development while providing no evidence that any aspect of the project directly threatened tribal sovereignty. If accepted, QIN's broad assertion of authority would increase uncertainty about how far tribal jurisdiction can reach to control the activities of nonmembers on non-Indian fee land. And such an expansion of tribal authority over nonmembers conflicts with "one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty.'" *Hicks*, 533 U.S. at 384 (quoting *Oliphant*, 435 U.S. at 210). For example, Justice Souter noted that "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Hicks*, 533 U.S. at 383. And "there is a definite trend by tribal courts toward the view that they have leeway in interpreting the [Indian Civil Rights Act's] due process and equal protection clauses and need not follow

the U.S. Supreme Court precedents 'jot-for-jot.'" *Id.* at 384 (internal punctuation and citation omitted).

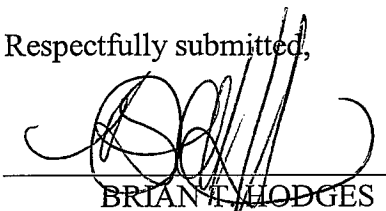
This policy concern applies here. Under the Federal and state Constitutions, Sea Crest has the right to own and use its property. *See* U.S. Const. amend. V; Wash. Const. art. I, § 16; *Mfr'd. Housing Cmtys. of Wash. v. State*, 142 Wn.2d 347, 368 (2000) (Property rights consist of the fundamental rights of possession, use, and disposition.). There is no dispute that QIN's attempt to exercise jurisdiction here sought to prohibit Sea Crest's use of its property, (and even ordered Sea Crest to pay the tribe the timber value of the trees that Sea Crest removed from its own private property). CP 15-17. Absent compelling justification under one of the *Montana* exceptions, an owner of non-Indian fee land should not be subjected to tribal court jurisdiction where his or her protected property rights do not stand on equal footing as they would in state or federal court.

## CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully request that this Court affirm the trial court's order denying QIN's petition for recognition of a tribal court order for lack of jurisdiction.

DATED: September 17, 2009.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

Brian T. Hodges declares as follows:

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On the below date, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT SEA CREST LAND DEVELOPMENT CO. were served via e-mail and first-class U.S. Mail, postage prepaid thereon, upon:

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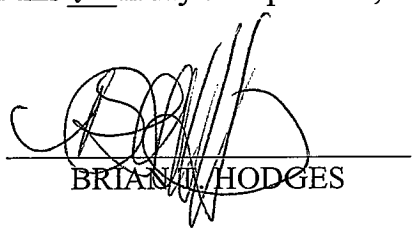
I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 17th day of September, 2009, at Bellevue, Washington.



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